IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1821

UNITED STATES OF AMERICA,

Petitioner,

v.

SYLVIA MENDENHALL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT

F. RANDALL KARFONTA
KENNETH R. SASSE
STEPHEN P. GLEIT
FEDERAL DEFENDER OFFICE
600 Woodward Avenue
Detroit, Michigan 48226
Telephone: (313) 961-4150

Counsel for Respondent

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

INDEX

CITATIONS

Constitution and Statutes:

United States Constitution:

Other Authorities:

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OPINIONS BELOW

The opinion of the *en banc* court of appeals (Pet. App. 1a-7a) is reported at 596 F.2d 706. The opinion of the panel (Pet. App. 8a) and the opinion of the district court (Pet. App. 9a-20a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1979. On April 27, 1979, Mr. Justice Stewart extended the time within which to file a petition for a writ of certiorari to June 5, 1979. The petition for a writ of certiorari was filed on that date and was granted on October 1, 1979. The jurisdiction of this Court is

invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether defendant was arrested within the meaning of the Fourth Amendment when she was seized without probable cause by federal agents in a room within a private, locked DEA office in an airport for the purpose of obtaining a search of her person.

2. Whether the detention and search of defendant was unjustified under the law of investigatory stops where federal agents knew only that defendant (a) was on a flight from Los Angeles to Detroit; (b) was the last passenger to get off the airplane; and, (c) upon deplaning, appeared nervous to the federal agents and looked around the area where the agents were standing.

3. Whether the consent to search given by the defendant was invalid where the consent was not voluntary and was the product of an illegal detention.

STATEMENT

1. At 6:25 a.m. on February 10, 1976 Sylvia Mendenhall was observed by two federal agents as she exited an American Airlines plane from Los Angeles at Detroit Metropolitan Airport. (A. 9-10) The agents had no information about Sylvia Mendenhall or any other passenger nor any tip that a delivery of narcotics was to occur. (A. 18)

According to DEA Agent Thomas Anderson, Sylvia Mendenhall was the last person to exit the aircraft and scanned the area where the agents were standing in a manner that "appeared to be very nervous." (A. 9, 14)

The agents followed Sylvia Mendenhall as she proceeded through the airport. She was overheard by

Agent Anderson asking directions to the Eastern Airlines ticket counter from a skycap.

Sylvia Mendenhall proceeded to the Eastern Airlines ticket counter, retrieved an airline ticket from her purse, and asked for an Eastern ticket to be used by her on a flight from Detroit to Pittsburgh. (A. 10) Anderson, standing in line behind her, observed that the ticket she presented was issued by American Airlines. The itinerary showed a flight from Los Angeles to Detroit to Pittsburgh. (A. 10) The ticket agent advised Sylvia Mendenhall that her ticket was good and that all she needed was an Eastern boarding pass. This was given to her. She proceeded down the concourse to board the Eastern flight. (A. 11)

Agent Anderson testified that he felt it was unusual for Sylvia Mendenhall to be changing from an American Airlines plane to an Eastern Airlines plane. (A. 17) However, neither Anderson nor his fellow agent made any effort to check the airlines flight schedules. (A. 17) In fact, there were no American flights to Pittsburgh as American Airlines did not fly between Detroit and Pittsburgh.[1]

Agent Anderson testified that as Sylvia Mendenhall was "approximately halfway down the concourse,

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[1] It appears that Agent Anderson, who had watched Sylvia Mendenhall exit an American Airlines flight from Los Angeles, assumed that she was booked on an American flight from Detroit to Pittsburgh merely because her itinerary was on an Americna ticket. (A. 10, 17) Given Anderson's ability to see and hear what occured at the Eastern ticket counter, (A. 11) his own experience as an airline passenger, (A. 16) and his assignment for over a year at the Detroit Metropolitan Airport DEA office, (A. 7) it is difficult to understand why he would make such an assumption. In any event, Sylvia Mendenhall could not have been booked on an American flight from Detroit to Pittsburgh as there were no such flights. *Official Airline Guide, North American Edition* at 709 (effective 2/1/76 to 2/15/76).

Agent Myhills and myself approached her, identified ourselves as Federal agents, and I requested some form of identification from the girl." (A. 11) According to Anderson, "[s]he was not nervous" at this time. (A. 18) Complying with the instruction of the agent, Sylvia Mendenhall produced her driver's license. Anderson asked her if she still resided at the address shown. She said she did. (A. 18)

The agent next asked Sylvia Mendenhall to produce her airline ticket. The ticket was produced for him. In response to Anderson's question, she told the agent that she had used a different name on the ticket because she felt like using the name. (A. 11) In response to further questioning Sylvia Mendenhall informed the agents that she had been in California for two days. (A. 12)

According to Agent Anderson, "I then told her that I specifically — that I was a Federal narcotics agent. She became quite shaken, extremely nervous. She had a hard time speaking." (A. 11-12) Anderson retained the driver's license and airline ticket while he questioned Sylvia Mendenhall. When he returned them he requested that she accompany the agents to their office "for further questioning". (A. 12) There is no evidence that Sylvia Mendenhall gave any verbal assent to the "request" of the agents. She was not told that she could refuse to accompany them to the office. Had she attempted to leave she would have been stopped. (A. 19)

The DEA office is located a story up from the airport concourse. The office is locked and not open to the public. (A. 19) Sylvia Mendenhall, on her own, "could have gone to that general area, but she certainly wouldn't have gone to our office." (A. 19)

Sylvia Mendenhall accompanied the two male

agents to the DEA office. Once inside the office the agents first brought up the matter of a body search. According to Anderson, "I asked her for her consent to search her person as well as her handbag. I stated to her that she had the right to decline the search if she so desired. Her response was 'Go ahead.'" (A. 12) A search of Sylvia Mendenhall's purse resulted in the discovery of a ticket issued February 7 from Pittsburgh to Chicago to Los Angeles. Sylvia Mendenhall acknowledged that this was the ticket she had used on her trip to California. (A. 12)

Agent Anderson then placed a telephone call to the airport security police requesting that a female officer come to the DEA office to search the person of Sylvia Mendenhall. (A. 12)

Beverly Mercier, a female police officer with the Metro Airport Police Department, subsequently arrived at the DEA office. (A. 23-24) Officer Mercier had previously searched women for various reasons, including approximately ten times for narcotics. She always had the women undress themselves. She had never had a case where a woman refused to consent to the search. (A. 26)

After giving the agents her gun, Officer Mercier took Sylvia Mendenhall into a separate room within the DEA office. (A. 24) If Sylvia Mendenhall had tried to leave the room prior to being searched by the officer she would have been stopped by the agents. (A. 21)

Officer Mercier testified that she asked Sylvia Mendenhall if she consented to the search: "At that moment she told me yes, she did. I said okay. It's a strip search. That means everything goes off. After that, she said—well, she had a plane to catch and I told her — I said, if you don't have anything on you, you don't have a problem." (A. 24) Officer Mercier had never

informed Sylvia Mendenhall that she did not have to be searched. (A. 27)

Sylvia Mendenhall began to undress under the direction of Officer Mercier although "[s]he kept saying she had a flight to catch." (A. 27) She eventually took off her blouse, brassiere, skirt, pantyhose, slip, and panties at the direction of the officer. Two packages, secreted in her brassiere and panties, were taken by the officer. (A. 24-25)

A personal history statement later taken from Sylvia Mendenhall revealed that she was twenty-two years old and had an eleventh grade education. (A. 13) An FBI record check indicated that she had two previous arrests; one for shoplifting, another for possession of marijuana. (A. 14)

It is unclear as to how much time elapsed while these events occurred. Agent Anderson testified that only five to six minutes elapsed from the time of the stop of Sylvia Mendenhall until she "consented" to the search. He estimated that Officer Mercier and Sylvia Mendenhall were in the room for approximately five to ten minutes while the strip search was conducted. (A. 13) Officer Mercier, however, testified that she did not receive the phone call asking her to assist the DEA agents on a search of a female until approximately 6:45 a.m. (A. 24) This was some twenty minutes after Sylvia Mendenhall's plane had arrived. (A. 8)

2. The search of Sylvia Mendenhall was conducted at the direction of agents assigned to the Drug Enforcement Administration's detail at the Detroit Metropolitan Airport. The legality of some of the activities of the agents assigned to the airport detail was first considered by the United States District Court for the Eastern District of Michigan in a number of cases

beginning in 1975.[2]

The procedure used by the airport detail is as follows: Agents watch passengers as they disembark flights from cities which the agents characterize as either a major narcotics distribution center or a city through which drug couriers pass on their way to a major narcotics distribution center. One or more passengers, usually described as "nervous" by the agents, are followed as they proceed through the airport. When it appears that passengers are about to leave the airport, they are stopped by the agents. Following a show of authority by the agents, identification, as well as the airline ticket, is required to be produced. Various questions are put to the passengers, including where they came from, how long they were there, and the purpose of their trip. The passenger is then removed to a private room, such as a baggage claim room, or to the DEA's private office at the airport. Inside the private room or office, the agents demand, and conduct, a search of the person and luggage of the passenger.

The stops and searches occur regardless of the amount or quality of the information known to the agents. At times, the knowledge possessed by the agents at the time of the stop and subsequent search has clearly provided probable cause for arrest. At other

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[2] The reported opinions include *United States v. Bryant*, 406 F. Supp. 635 (E.D. Mich. 1975); *United States v. Van Lewis*, 409 F. Supp. 535 (E.D. Mich. 1976); *United States v. Floyd*, 418 F. Supp. 724 (E.D. Mich. 1976); *United States v. Allen*, 421 F. Supp. 1372 (E.D. Mich. 1976); *United States v. Miles*, 425 F. Supp. 1256 (E.D. Mich. 1977); *United States v. Chambliss*, 425 F. Supp. 1330 (E.D. Mich. 1977); *United States v. Dewberry*, 425 F. Supp. 1336 (E.D. Mich. 1977); *United States v. Rogers*, 436 F. Supp. 1 (E.D. Mich. 1976); *United States v. Coleman*, 450 F. Supp. 433 (E.D. Mich. 1978); *United States v. McClain*, 452 F. Supp. 195 (E.D. Mich. 1977).

times, however, agents have made arrests and searches based on the most innocuous of information. In these instances, when narcotics have been discovered, the government has sought to justify the search on the basis of an unwritten "drug courier profile."[3]

3. The United States Court of Appeals for the Sixth Circuit has reviewed dozens of cases involving the search of airline passengers. While the Sixth Circuit has refused to uphold searches merely on the government's claim that a defendant satisfied the "drug courier profile," the court has, in a series of opinions, provided guidelines to the lower courts as well as the agents.

In *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977), the court refused to uphold a stop where several profile characteristics were allegedly satisfied. The opinion noted, however, that "a set of facts may arise in which the existence of certain profile characteristics constitutes reasonable suspicion." *Id.* at 720. The court upheld a stop in *United States v. Smith*, 574 F.2d 882 (6th Cir. 1978) where the only information the agents had beyond the satisfaction of some of the "profile characteristics" was that the defendant exhibited an abnormal abdominal bulge. Likewise, in *United States v. Canales*, 572 F.2d 1182 (6th Cir. 1978), the court upheld a stop as being based on reasonable suspicion even though defendant's "traveling was potentially innocent and capable of explanation." *Id.* at 1187.

The Sixth Circuit has not required probable cause to support a stop at the airport. Rather, the lower standard of reasonable suspicion has been employed.

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[3] Some of the characteristics of the "drug courier profile," as testified to by agents assigned to the Detroit Metropolitan Airport detail, are listed *infra* at p. 42, nn. 23, 24.

Thus, a stop at the airport was upheld in *United States v. Andrews*, 600 F.2d 563 (6th Cir. 1979), although the informer's tip relied upon was insufficient under both prongs of the probable cause test advanced by this Court.

The Sixth Circuit has held that reasonable suspicion does not, however, support a search for narcotics. *United States v. Craemer*, 555 F.2d 594 (6th Cir. 1977). Taking a passenger out of the public area and detaining him in a private airport office for the purpose of search goes beyond a *Terry* stop and is an arrest requiring probable cause. *United States v. Hunter*, 550 F.2d 1070 (6th Cir. 1977); *United States v. McCaleb, supra.* The court has also held that a passenger who went to the DEA office at his own request was not under arrest and probable cause was not required. *United States v. Canales, supra.*

In determining whether probable cause exists to support an arrest and search at the airport, the Sixth Circuit has held that "using the profile to determine probable cause would engage this Court in an improper analysis." *United States v. Lewis*, 556 F.2d at 389. The Sixth Circuit has adopted the analytical approach set down by then Circuit Judge Burger in *Smith v. United States,* 385 F.2d 833 (D.C. Cir. 1966):

> [P]robable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observe as trained officers. We weigh not individual layers but the "laminated" total.
>
> *Id.* at 837. *United States v. Lewis, supra*, at 389; *United States v. Prince*, 548 F.2d 164, 166 (6th Cir. 1977).

Although the Sixth Circuit has held that meeting the "profile" does not establish probable cause, "facts

known to the agents which correspond to characteristics in the profile may be considered along with information obtained from other soures in determining that the agents did have probable cause to believe that an offense is being or has been committed." *United States v. Pope*, 561 F.2d 663, 667 (6th Cir. 1977). The court has upheld searches where information that satisfied some characteristics of the "drug courier profile" together with an agent's investigation provided probable cause. *United States v. Lewis, supra; United States v. Prince, supra.*

The Sixth Circuit has refused to uphold searches at the airport where probable cause did not exist and where a consent was obtained through the exploitation of illegal actions and was not freely and voluntarily given. In *United States v. McCaleb, supra*, the court cited *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) and *Wong Sun v. United States*, 371 U.S. 471 (1963) in holding that a "consent" could not uphold a search where it followed an unconstitutional stop and arrest and was obtained while the defendants were detained by agents in unfamiliar surroundings. The court, however, has upheld a search, as based on voluntary consent, where the defendant, maintaining his innocence, invited a search to demonstrate to the agents that he was not carrying narcotics. *United States v. Canales, supra.*

4. The evidentiary hearing in this case was held on October 18, 1976. (A. 3) Sylvia Mendenhall failed to appear for this hearing. Over objections by her counsel, the court proceeded in her absence.

Following the defendant's arrest, defense counsel moved for rehearing so that defendant could present evidence relevant to her arrest and alleged consent to search. This was denied.

The defendant was charged, by indictment, with bond-jumping as a result of her failure to appear at the evidentiary hearing in the instant case. (E.D. Mich. Cr. No. 7-81109). Following a bench trial she was acquitted of this charge.

In her direct appeal to the Sixth Circuit in the instant case Sylvia Mendenhall alleged that the district court erred in its refusal to re-open the evidentiary hearing since it has never been established that Sylvia Mendenhall voluntarily absented herself from the hearing. Both the panel and the en banc decisions of the Sixth Circuit found the search invalid on the present record, however, and did not reach this question.

5. The district court, by a "Memorandum and Order" dated November 18, 1976, denied defendant's "Motion to Suppress Evidence." (Pet. App. 9a)

Following a non-jury trial on stipulated facts, Sylvia Mendenhall was convicted of possession of heroin with intent to distribute it in violation of 21 U.S.C. §841(a)(1). She was sentenced to a term of 18 months imprisonment to be followed by a three-year special parole term.

6. A panel of the Court of Appeals reversed. An "Order" entered on October 20, 1978 stated that "the court concludes that this case is indistinguishable from *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977)." (Pet. App. 8a)

The case was reheard by the court en banc, along with *United States v. Camacho*, No. 78-5081. In reinstating the panel decision, the court stated:

> Our review of the facts in both of these cases convinces the majority of this court that in neither case was there valid consent to search within the meaning of *United States v. McCaleb*, 552 F.2d

717 (6th Cir. 1977). We also hold that the so-called drug courier profile does not, in itself, represent a legal standard of probable cause in this Circuit. We recognize, of course, that the drug enforcement agency's employment of this profile in educating its officers as to what conduct to look for in relation to drug couriers is a perfectly valid law enforcement device.
(Pet. App. 2a)

SUMMARY OF ARGUMENT

I

A. A reasonable person in the position of Sylvia Mendenhall could only believe she was under arrest. Sylvia Mendenhall was stopped on the way to board her flight to Pittsburgh by federal agents who required that she produce identification. They retained the identification while asking additional questions and requiring that she produce her airplane ticket. She was escorted out of the public area of the airport to the private locked office of the Drug Enforcement Administration, where the subject of a body search was first raised.

From the outset the objective of the agents was to search for narcotics. There is no suggestion that Sylvia Mendenhall was told that she did not have to answer the questions of the agents, or that she would be released to catch her flight.

There is nothing in this record to suggest that any consent to the DEA office detention, verbal or otherwise, was ever requested by the agents or given by Sylvia Mendenhall. Sylvia Mendenhall was not told, nor did she have any reason to assume, that she had any choice but to accompany the agents. She was not free to

leave. Had she attempted to walk away she would have been stopped.

B. The DEA office detention in this case constituted an arrest. The facts of this case clearly meet the constitutionally mandated criteria for determining point of arrest:

(1) The freedom of movement of Sylvia Mendenhall was absolutely restrained. *See Henry v. United States*, 361 U.S. 98 (1959); *Dunaway v. New York*, ___ U.S. ___, 99 S.Ct. 2248 (1979).

(2) The purpose of the detention was to look for narcotics. *See Sibron v. New York*, 392 U.S. 40 (1968); *Terry v. Ohio*, 392 U.S. 1 (1968); *Ybarra v. Illinois*, ___ U.S. ___, 48 U.S.L.W. 4023 (U.S. Nov. 28, 1979).

(3) The length of detention must be characterized as a threatened indefinite detention. *See U.S. v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Terry v. Ohio, supra.*

II

A. *Terry v. Ohio, supra*, and its progeny have required something more substantial than inarticulate hunches or even good faith on the part of a police officer before a citizen may be subjected to an investigative stop.

The facts known to the federal agents at the time they stopped, and seized, Sylvia Mendenhall were that she had arrived in Detroit on an American Airlines flight from Los Angeles, was the last passenger to get off the airplane, and had glanced around the deplaning area in what the agents characterized as a nervous manner.

Two other pieces of information were stated by the agents as drawing their attention to Sylvia Mendenhall, but this information evaporated prior to the moment of the stop. The fact that Sylvia Mendenhall

picked up no luggage had no probative value when the agent discovered that Sylvia Mendenhall was not stopping in Detroit, but was ticketed through to Pittsburgh. The fact that Sylvia Mendenhall was flying on to Pittsburgh on Eastern Airlines rather than American had no value because the agent testified that he was not aware of the airline schedules involved and thus could attach no significance to the route Sylvia Mendenhall was taking.

Had the agents been familiar with airline scheduling or taken a moment to check it, they would have discouraged that, as most travellers know, when a person is ticketed to destination on two different airlines, the baggage is automatically transferred. The agents also would have discovered that American Airlines did not schedule any flights from Detroit to Pittsburgh.

Rather than continuing their surveillance, the agents stopped Sylvia Mendenhall with the clear intention of obtaining a search of her person for narcotics prior to restoring her freedom.

B. It is clear that the *Terry* seizure was complete and Sylvia Mendenhall's liberty was restrained when the agents requested and retained her driver's license, continued to question her, and then required her to give them her airplane ticket. Sylvia Mendenhall's freedom to walk away was restrained and she was seized within the meaning of *Terry, supra; United States v. Brignoni Ponce*, 422 U.S. 873 (1975); and, *Brown v. Texas*, ___ U.S. ___, 99 S.Ct. 2637 (1979).

C. Reliance upon an "airport drug courier profile" cannot provide the missing reasonable suspicion in this case. This unwritten profile seems to contain every characteristic one could use to describe a human being. It is clear that almost all travellers would fit a large

number of the profile characteristics that have been named thus far.

All the courts of appeals that have analyzed this airport courier profile agree that it is an insufficient basis upon which to justify an investigatory stop. A profile cannot eliminate the case-by-case approach to determine whether there is reasonable suspicion to stop a citizen. The courts of appeals have refused to allow use of the "profile" to elevate facts, such as those observed in this case, in order to justify an investigatory stop.

D. The degree of restraint imposed on Sylvia Mendenhall exceeded that permissible in an investigatory detention. *United States v. Brignoni-Ponce, supra*, represents the greatest interference with privacy and freedom of movement that this Court has allowed in seizures that are not supported by probable cause. In *Brignoni-Ponce* the detention was a visual inspection that normally lasted less than a minute. The treatment of Sylvia Mendenhall by the agents constituted an illegal seizure of her person even if a less intrusive investigation would have been permissible.

E. The kind of power sought by the government in this case would necessarily entail substantial intrusions upon the fourth amendment protection of large numbers of citizens and would seriously impair the right to travel and to privacy itself.

III.

A. The "consent" of Sylvia Mendenhall was not freely and voluntarily given. She was stopped by two men who identified themselves as federal agents, was questioned by them, and was required to produce identification and her airline ticket. She was ushered

into the private, locked office of the DEA where an agent requested consent to search "her person as well as her handbag."

Immediately prior to being taken to the DEA office and granting "consent" Sylvia Mendenhall was described by the agent as being quite shaken, extremely nervous and having a hard time speaking. She could only believe that she would be held indefinitely, or forcibly searched by male agents, unless consent to search was given.

It was not until the female police officer arrived that Sylvia Mendenhall was first informed that the search of "her person as well as her handbag" was to be a full strip search. She began protesting that she had a plane to catch. Whatever the validity of her earlier "consent" it was revoked at this point. The search, however, commenced despite Sylvia Mendenhall's continued protests that she had a plane to catch.

The government has failed to meet its burden of proving that the "consent" was truly free and voluntary and not the result of duress or coercion, express or implied. *Bumper v. North Carolina*, 391 U.S. 543 (1968); *Schneckloth v. Bustamonte*, 412 U.S. 212 (1973). Given the serious physical restraints, the psychological pressure, and her own subjective state, the consent of Sylvia Mendenhall was not the product of a free will.

B. Apart from the involuntary nature of the "consent" under the totality of the circumstances, the "consent" was invalid because it was obtained through the exploitation of illegal police conduct. Sylvia Mendenhall was stopped without reasonable suspicion and arrested without probable cause. The "consent" was given while the illegal detention continued.

The only intervening circumstance claimed is that

Sylvia Mendenhall, while locked in the private DEA office, was told that she could refuse consent. The decisions of this Court in *Brown v. Illinois*, 422 U.S. 590 (1975) and *Dunaway v. New York*, ___ U.S. ___, 99 S.Ct. 2248 (1979) are dispositive of the claim that this fact, standing alone, is sufficient to dissipate the taint of the illegality that preceded it.

The agents illegally seized Sylvia Mendenhall in the hope that something might turn up. The "consent" was obtained within minutes of the illegal stop and arrest. There was no intervening factor of significance. The "consent," obtained through the exploitation of illegal actions, cannot support the search.

C. The court of appeals correctly applied the established law of this Court in refusing to uphold the search of Sylvia Mendenhall.

ARGUMENT

I.

DEFENDANT WAS ARRESTED WITHIN THE MEANING OF THE FOURTH AMENDMENT WHEN SHE WAS SEIZED WITHOUT PROBABLE CAUSE BY FEDERAL AGENTS IN A ROOM WITHIN A PRIVATE LOCKED DEA OFFICE IN AN AIRPORT FOR THE PURPOSE OF OBTAINING A SEARCH OF HER PERSON.

A. The Detention of Defendant Required Probable Cause Before Her Interests of Privacy and Personal Security Gave Way.

When Sylvia Mendenhall was taken by two federal agents from the public airport concourse to a locked private DEA interrogation office for the purpose of

obtaining a search of her person an arrest had occurred. The normal level of probable cause was necessary before the interests of privacy and personal security would give way. The law concerning the point of arrest was recently reaffirmed in *Dunaway v. New York*, ___U.S. ___, 99 S.Ct. 2248 (1979).

The clarity of the arrest issue is dispositive of the entire matter for the government does not claim probable cause to arrest. There is no airport DEA office exception to the fourth amendment.

The arrest, both in design and execution, was an investigatory seizure to search Sylvia Mendenhall and her belongings for contraband. The question of a search of Sylvia Mendenhall was not brought up in the public concourse. Rather, the matter was broached when she had been secured in the locked DEA office. There was nothing in the transaction that would cause Sylvia Mendenhall to believe that she would be free to depart and catch her flight to Pittsburgh.[4]

The defendant here, like the defendants in *Brown v. Illinois*, 422 U.S. 590 (1975) and *Dunaway v. New York, supra*, was admittedly seized without probable cause in the hope that something might turn up; she assented without any intervening event of significance.

1. A reasonable person in the position of defendant could only believe that she was under arrest.

Sylvia Mendenhall was stopped by persons, unfamiliar to her, who identified themselves as agents of the

[4] If a citizen in the DEA office chooses not to consent to the search, then this person will be required to wait in the locked office until an "attempt" [is made] to obtain a federal search warrant." Government's Petition for Rehearing with Suggestion for Rehearing En Banc at 8, *United States v. Mendenhall*, 596 F.2d 706 (6th Cir. 1979).

United States. (A. 11) The agents demanded identification from her. They retained that identification while asking a series of additional questions and requiring her to produce her airplane ticket. (A. 11-12, 18-19) There is no suggestion that she was informed by the agents of any option not to answer their questions.

She was soon afterwards escorted out of the public area of the airport. (A. 19) The agents never inquired as to when her scheduled flight would be leaving. Sylvia Mendenhall was never informed that she did not have to accompany the agents or that she could leave if she so chose.

Sylvia Mendenhall was taken inside the private, locked office of the Drug Enforcement Administration. (A. 19) The office was unfamiliar to her. At this time there is still no suggestion by the agents that she is free to leave. Presumably, the agents, not Sylvia Mendenhall, hold the keys. The questioning continues.

2. The detention in this case went beyond established law defining the parameters of a *Terry* stop.

The intrusion here bears no resemblance to the investigatory stops that have been considered by this Court. In *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the visual inspections involved no search of the vehicle or its occupants and "usually consume[d] no more than a minute." In contrast, the detention of Sylvia Mendenhall was not to maintain the status quo as envisioned in *Adams v. Williams*, 407 U.S. 143 (1972), but to search for narcotics. Under *Terry v. Ohio*, 392 U.S. 1 (1968) such a purpose is constitutionally impermissible:

> The *Terry* case created an exception to the requirement of probable cause, an exception

whose "narrow scope" this Court "has been careful to maintain." Under that doctrine a law enforcement officer, for his own protection and safety may conduct a pat down to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted. See, *e.g.*, *Adams v. Williams, supra* (at night, in high-crime district, lone police officer approached person believed by officer to possess gun and narcotics). Nothing in *Terry* can be understood to allow a generalized "cursory search for weapons" or, indeed, any search whatever for anything but weapons.

> *Ybarra v. Illinois*, ___ U.S. ___, 48 U.S.L.W. 4023, 4025 (U.S. November 28, 1979). See also *Warren v. Mississippi*, ___ U.S. ___, 48 U.S.L.W. 3322 (U.S. November 13, 1979) (Mr. Justice White dissenting from the denial of the peition for writ of certiorari.)

There is nothing in this record that justifies the detention of Sylvia Mendenhall in the locked DEA office. There is nothing in this record which indicates that there was any question of safety or protection of the officers. *Terry v. Ohio, supra; Pennsylvania v. Mimms*, 434 U.S. 106 (1977). Sylvia Mendenhall had just gotten off the airplane and presumably had passed through a metal detector in Los Angeles and hence, she carried no weapons. The intrusion here cannot be rationally compared to the de minimis intrusion in *Mimms* where the only question was whether a driver shall spend the period of a brief detention sitting in the driver's seat of his car or standing alongside it.

There is nothing in this record which indicates that the area where Sylvia Mendenhall was first stopped was noisy or crowded. Indeed, it is unlikely that the concourse was noisy or crowded at 6:25 in the morning. Further, it is clear that the intent of the agents was to

isolate Sylvia Mendenhall and it is unlikely that they would have chosen a busy spot for the stop.

Similarly, there is nothing in this record indicating compelling circumstances for the agents to avoid attention to themselves. Further, in determining whether an arrest has occurred, it is the treatment of the citizen under the probable cause standard which is relevant:

> A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront. Indeed, our recognition of these dangers, and our consequent reluctance to depart from the proven protections afforded by the general rule, is reflected in the narrow limitations emphasized in the cases employing the balancing test. For all but those narrowly defined intrusions, the requisite "balancing" has been performed in centuries of precedent and is embodied in the principle that seizures are "reasonable" only if supported by probable cause.
>
> *Dunaway v. New York*, 99 S.Ct. at 2257 (footnote omitted).

Finally, there is nothing in this record which indicates that Sylvia Mendenhall was concerned by public embarrassment and was anxious to choose incommunicado detention instead.[5]

3. The defendant did not consent to the detention.

The record in this case is completely barren of any facts that would support a finding that Sylvia

[5] Different circumstances illustrating a citizen anxious to avoid embarrassment are found in *United States v. Canales*, 572 F.2d 1182 (6th Cir. 1978).

Mendenhall freely and voluntarily consented to the detention in the DEA office.

At the conclusion of the agents' interrogation of Sylvia Mendenhall in the public concourse she was quite shaken, extremely nervous, and having a hard time speaking. Yet, the government alleges that at this point she freely and voluntarily consented to the detention that followed. Agent Anderson testified:

> I then told her that I specifically—that I was a Federal narcotics agent. She became quite shaken, extremely nervous. She had a hard time speaking. I handed her her ticket back and her driver's license back. She had a very difficult time getting these back into her purse, and at that time I asked her if she would accompany myself and Agent Myhills to our office, which was very nearby, very close, for further questioning.
> (A. 12)

This is the only testimony in this record describing the initiation of the trip to the DEA office. There is nothing in the record to suggest that any consent to the detention, verbal or otherwise, was ever requested by the agents or given by Sylvia Mendenhall.

Sylvia Mendenhall was not told, nor did she have any reason to assume, that she had any choice but to accompany the agents. She was not free to leave. Had she attempted to walk away she would have been stopped. (A. 19)[6]

The government has failed to meet its burden of proving that Sylvia Mendenhall freely and voluntarily

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[6] Had Sylvia Mendenhall attempted to leave the agents, she arguably would have violated 18 U.S.C. 751 (a) (attempting to escape from the custody of an officer of the United States) or 18 U.S.C. 111 (forcibly resisting, opposing, or impeding an officer of the United States).

consented to the detention.[7] Additionally, the stop of Sylvia Mendenhall, preceding her alleged consent to detention, was not based on reasonable suspicion. The government has likewise failed to meet its burden of proving that the alleged consent to detention was not the product of the illegality of the stop.[8] In the complete absence of any facts in the record suggesting a valid consent, the detention of Sylvia Mendenhall was an arrest.

B. The Point of Arrest Requiring Probable Cause Occurs When the Detention Deprives a Citizen of Liberty Within the Meaning of the Fourth Amendment.

This Court in *Dunaway v. New York, supra*, has squarely held that the type of detention described in this record constitutes an arrest:

> [T]he detention of petitioner was in important respects indistinguishable from a traditional arrest. Petitioner was not questioned briefly where he was found. Instead, he was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room. He was never informed that he was "free to go;" indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody.
>
> *Id.* at 2256.

The detention of Sylvia Mendenhall is indistinguishable from the detention described above.

The deprivation of liberty standard articulated in *Dunaway* is well settled and is rooted in both Supreme

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[7] See, *infra* p. 50, where the question of defendant's alleged consent to the search of her person is discussed.

[8] See, *infra* p. 54, where the effect of the illegal top and arrest on the alleged consent to the search of her person is discussed.

Court and common law decisions. In *Henry v. United States*, 361 U.S. 98 (1959), the Court reversed the conviction of the defendant because the arresting officers did not have probable cause at the time the defendant was arrested. *Id.* at 103-04. In reaching this conclusion, the Court first had to determine the point at which the defendant was arrested.

> The prosecution conceded below, and adheres to the concession here, that the arrest took place when the federal agents stopped the car. That is our view on the facts of this particular case. When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete.
>
> *Id.* at 103 (footnote omitted). *See also Peters v. New York*, 392 U.S. 40, 67 (1968).

The common law provides further support for the deprivation of liberty test and, indeed, forms the historical basis for this standard. Blackstone provides the classical definition of arrest.

> [T]he apprehending or restraining of one's person, in order to be forcoming to answer an alleged or suspected crime.
>
> 4 W. Blackstone, Commentaries *289. *See also Genner v. Sparks*, 91 Eng. Rep. 74 (C.P. 1704).

Similarly, Perkins, in his definitive arrest article, states,

> Mere words will not constitute an arrest, while, on the other hand, no actual, physical touching is essential. The apparent inconsistency in the two parts of this statement is explained by the fact that an assertion of authority and purpose to arrest followed by submission of the arrestee constitutes an arrest.
>
> Perkins, *The Law of Arrest*, 25 Iowa L. Rev. 201, 260 (1940) (Footnotes omitted).

The detention at the DEA office at Detroit Metropolitan Airport constituted a deprivation of liberty under authority of law, and, therefore, an arrest for purposes of the fourth amendment.

1. The constitutionally mandated criteria for determining the point of arrest are the detained person's freedom of movement, the purpose of the detention and the length of detention.

Although *Terry v. Ohio*, 392 U.S. 1 (1968) permits a brief stop in certain circumstances, the factors which distinguish a *Terry* stop from an arrest compel the conclusion that the instant detention must be characterized as an arrest.

A review of the case law identifies three criteria to be used in determining the point of arrest:[9]

[9] Post-*Terry* decisions in the courts of appeals have applied these criteria: *Coates v. United States*, 413 F.2d 371, 373-74 (D.C. Cir. 1969); *United States v. Miller*, 589 F.2d 1117, 1127 (1st Cir. 1978); *United States ex rel. Walls v. Mancusi*, 406 F.2d 505, 508-509 (2nd Cir. 1969); *United States v. Lampkin*, 464 F.2d 1093, 1095 (3rd Cir. 1972); *United States v. Johnson*, 495 F.2d 378, 381 (4th Cir. 1975); *United States v. Brunson*, 549 F.2d 348, 357 (5th Cir. 1977) *United States v. Jackson*, 533 F.2d 314, 315-16 (6th Cir. 1976); *United States v. Guana-Sanchez*, 484 F.2d 590, 591 (7th Cir. 1973); *United States v. Chaffen*, 587 F.2d 920, 923 (8th Cir. 1978); *United States v. Beck*, 598 F.2d 497, 500-01 (9th Cir. 1979); *United States v. McDevitt*, 508 F.2d 8, 11-12 (10th Cir. 1974).

The Michigan Supreme Court has adopted a similar definition of arrest. In *People v. Gonzales*, 356 Mich. 247, 97 N.W.2d 16 (1959), the court stated:

> "An arrest is the taking, seizing, or detaining of the person of another, either by touching or putting hands on him, or by any act which indicates an intention to take him into custody and subjects the person arrested to the actual control and will of the person making the arrest. The act relied upon as constituting an arrest must have been performed with the intent to effect an arrest and must have been so understood by the party arrested." 4 Am.Jur., Arrest, 2.
>
> *Id.* at 253, 97 N.W.2d at 19. *See also People v. Ulrich*, 83 Mich. App. 19, 268 N.W.2d 269 (1978).

(1) The detained person's freedom of movement. *Henry v. United States, supra; Dunaway v. New York, supra.*
(2) The purpose of the detention. *Sibron v. New York*, 392 U.S. 40 (1968);
(3) The length of the detention. *United States v. Brignoni-Ponce, supra.*

Freedom of Movement. In *Dunaway v. New York, supra*, this Court specified freedom of movement as a controlling factor in determining the point of arrest. This decision reaffirmed the rule that a complete restriction of the freedom of movement would constitute an arrest for purposes of the fourth amendment.

Here, the freedom of movement by Sylvia Mendenhall must be found to have been absolutely restricted. She was stopped by federal agents who identified themselves as such. (A. 11) After questioning, she was taken up to the DEA office on the mezzanine level of the airport. This office is not open to the public and is locked. (A. 19)

Throughout this detention, Sylvia Mendenhall was not told that she was free to leave. The agent testified that the defendant would not have been free to leave at the initial stop, (A. 19) at the time of the request to go to the DEA office, (A. 19) or at the time of the full strip search, (A. 21) and that she would have been stopped had she attempted to do so.

Purpose of the Detention. In *Terry v. Ohio, supra*, and its progeny, the Court stated that either the determination of the detained person's identity or the maintenance of the "status quo" momentarily while waiting for extrinsic information to arrive were both permissible purposes justifying a brief *Terry* stop. Several courts have concluded that stops for purposes beyond those delineated purposes could not be justified under *Terry*, but were, in fact, arrests.

In *Sibron v. New York*, 392 U.S. 40 (1968), the Court held that "looking for narcotics" was not a permissible reason for justifying a *Terry* stop and subsequent search. *Id.* at 65; *see also, Ybarra v. Illinois*, 48 U.S.L.W. at 4025. In *United States v. Chatman*, 573 F.2d 565 (9th Cir. 1977), the Court of Appeals for the Ninth Circuit held that when the purpose of the stop went beyond *Terry* and became one of searching for narcotics, an arrest, necessitating probable cause, had occurred. *Id.* at 567.

These decisions compel the conclusion that the detention of the defendant in the DEA office, at the time permission to search was requested, constituted an arrest. The record demonstrates that neither routine identification questioning nor maintenance of the status quo was the reason for the detention of the defendant at the time of the "consent to search" request. Rather, the only purpose in bringing the defendant to the DEA office was for the purpose of carrying out a search for narcotics. Indeed, the government concedes that upon arriving at the DEA office, the detained person, pursuant to DEA procedures, is asked for consent to be searched. Government's Petition for Rehearing with Suggestion for Rehearing En Banc, at 7, *United States v. Mendenhall*, 596 F.2d 706 (6th Cir. 1979).

This stated DEA objective in detaining persons goes far beyond the legitimate scope of a *Terry* stop. *Sibron v. New York*, 392 U.S. at 65. Once the purpose of the detention is to look for narcotics, the detention must be justified by probable cause, since the detention no longer is a *Terry* stop, but constitutes an arrest.

Length of Detention. The Supreme Court, in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), states that the stop contemplated by *Terry* must be "brief."

Id. at 881. Underscoring the importance of this requirement, the Court adds that "any further detention or search must be based on consent or probable cause." *Id.* at 878. In contrast, the stops effected by the DEA pursuant to its program, involve the threat of indefinite detention and must therefore be classified as arrests and not *Terry* stops.

The DEA procedure, once at the office stage, does not contemplate the brief stop permitted under *Terry*. As the government has noted, if a person stopped by the DEA chooses not to consent to the search, the person will be required to wait in the locked office until an "attempt [is made] to obtain a federal search warrant." Government's Petition for Rehearing with Suggestion for Rehearing En Banc, at 8, *United States v. Mendenhall, supra.* This threat of "indefinite detention," for purposes of narcotics investigation and without any opportunity for the detained person to leave, goes far beyond a brief *Terry* stop and must be found to constitute an arrest. See *United States v. Wylie*, 569 F.2d 62, 71 n.11 (D.C. Cir. 1977).

The detention of Sylvia Mendenhall must be characterized as a threatened indefinite detention. The circumstances establish that she was to be detained until the agents had either found what they were looking for or determined through a search that she carried no drugs.[10] No time frame was ever specified to her. Although the record is unclear regarding how much time elapsed from the stop until the search actually

[10] In *United States v. Camacho*, 596 F.2d 706 (6th Cir. 1979) the companion case to this case for the en banc hearing. Camacho had at least been given an upper time limit by the agents. The agent told Camacho that it would take "an hour or three or four hours" to attempt to obtain a search warrant after Camacho had asked him what would happen if he refused to consent to a search. (C.A. App. 88).

took place, it is clear that it was much longer than the "modest" intrusion envisioned in *United States v. Brignoni-Ponce, supra*, which "usually consume[d] no more than a minute."[11] 422 U.S. at 880. The threatened indefinite detention here was an invasion of personal security which indicates that an arrest occurred.

2. The Courts of Appeals have employed the constitutional arrest criteria in deciding the point of arrest in airport search cases.

The foregoing criteria together with the circumstances of this case describe an arrest for which probable cause is required before a citizen's interest of privacy and personal security must give way. The panel decision and the en banc Court of Appeals in this case found that such an arrest had occurred and that the facts of this case were very similar to and controlled by the Court of Appeals holding in *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977). *United States v. Mendenhall*, 596 F.2d 706 (6th Cir. 1979).

United States v. McCaleb, supra, does not hold or imply that a *Terry* stop is converted into an arrest whenever a person is moved from the location at which he is stopped. Nowhere does *McCaleb* hold that the act of movement requires probable cause.

McCaleb simply holds that under the circumstances of that case "when appellants were taken to the private office and were not free to leave, the arrest was clearly complete." 552 F.2d at 720. In this case when Sylvia Mendenhall was secured behind a locked door for the purpose of an investigatory search detention, the arrest was complete.

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[11] In *Dunaway v. New York, supra*, defendant was taken from a neighbor's house. 99 S.Ct. at 2251. Presumably someone knew he had been taken into police custody. Sylvia Mendenhall's indefinite detention was incommunicado.

Other circumstances require different legal conclusions. When probable cause to arrest is present a detention to search is justified. *United States v. Lewis*, 556 F.2d 385 (6th Cir. 1977). Facts creating a reasonably inferred tie-in with trading in narcotics justify an investigatory stop, *United States v. Andrews*, 600 F.2d 563 (6th Cir. 1979), which can result in a voluntary trip to the DEA office. *United States v. Canales*, 572 F.2d 1182 (6th Cir. 1978). In *Canales* the record reflected that the defendant indicated discomfort at continuing the interrogation in front of his wife and stepson and, in a show of bravado, insisted on going to the DEA office.

Similarly, in *United States v. Chatman, supra*, the Court of Appeals for the Ninth Circuit found that the search of defendant's person in the agents' office required probable cause.

Sylvia Mendenhall's freedom of movement was absolutely restrained in a detention of indefinite duration for the purpose of a body search for narcotics. What the government fails, or refuses to perceive is that a reasonable person in the position of Sylvia Mendenhall could only believe that he or she was not free to leave. The agent's testimony confirms the objective facts and circumstances that would leave any reasonable person in Sylvia Mendenhall's position to believe that he or she was not free to leave. The record here compels a legal as well as a common sense conclusion that an arrest has occurred.

II.

THE DETENTION AND SEARCH OF DEFENDANT CANNOT BE JUSTIFIED UNDER THE LAW OF INVESTIGATORY STOPS WHERE FEDERAL AGENTS KNEW ONLY THAT DEFENDANT (1) WAS ON A FLIGHT FROM LOS ANGELES TO DETROIT, (2) WAS THE LAST PASSENGER TO GET OFF THE AIRPLANE, AND (3) UPON DEPLANING APPEARED NERVOUS TO THE FEDERAL AGENT AND LOOKED AROUND THE AREA WHERE AGENTS WERE STANDING.

A. There Was No Reasonable Suspicion Within the Meaning of the Fourth Amendment to Permit an Investigatory Stop of Defendant.

The following factors were articulated to justify the stop, arrest and search of Sylvia Mendenhall: (1) She was on an American Airlines flight from Los Angeles to Detroit; (2) she was the last passenger to get off the airplane; (3) upon deplaning, she appeared nervous to DEA Agent Anderson and looked around the area where the agents were standing; (4) she was changing from American Airlines to Eastern Airlines to continue to Pittsburgh; and (5) she picked up no luggage.

Factors four and five completely evaporated prior to the investigative stop in this case. Of course, only valid facts known to the officer at the moment of seizure are relevant:

> [I]n making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?

Terry v. Ohio, 392 U.S. at 21-22 (citations omitted).

Transfer of Airlines. Although the government has argued that agents are aware of airline routing,[12] here the agent testified that he did not know the flight schedule relevant to this case. (A. 17) Therefore the agent was not in a position to know whether the fact that Sylvia Mendenhall was continuing to Pittsburgh via Eastern Airlines was unusual or not. There were no facts known to him that would support a conclusion that Sylvia Mendenhall was changing to an Eastern flight after having previously been booked on an American flight to Pittsburgh. The agent had observed her at the Eastern ticket counter where she was told that she needed only a boarding pass. (A. 11) From this information alone the agent should have known that Sylvia Mendenhall was confirmed on the Eastern flight to Pittsburgh prior to her arrival in Detroit.

Had the agent been familiar with the airline routing, or taken a moment to check it, he would have learned that there were no American flights from Detroit to Pittsburgh. He also would have learned that Eastern flight 341 from Detroit to Pittsburgh was a regularly scheduled connecting flight with American flight 218 from Los Angeles to Detroit. *Official Airline Guide, North American Edition* at 709, 711-12 (effective 2/1/76 to 2/15/76). Sylvia Mendenhall had no choice but to fly another carrier from Detroit to Pittsburgh.

The "transfer of airlines" characteristic does not appear to have been relied upon by the government in any other "profile" case. See *United States v. Westerbann-Martinez*, 435 F. Supp. 690 (E.D. N.Y. 1977).

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[12] See, Supplemental Brief for the United States, Rehearing En Banc, at 23, *United States v. Mendenhall*, 596 F.2d 706 (6th Cir. 1979).

Indeed, it conflicts with testimony given by DEA agents in other cases that the profile includes taking direct flights from specified cities. See *United States v. Floyd*, 418 F. Supp. 724, 725 (E.D. Mich. 1976); *United States v. Rogers*, 436 F. Supp. 1, 3 (E.D. Mich. 1976).[13]

The purported rationale for the transfer factor is that drug couriers frequently change airlines and flight times to guard against the risk that someone has given the authorities a tip that a narcotics courier would be arriving in a given city on a particular flight. Here this factor evaporated completely prior to the stop of Sylvia Mendenhall:

(1) The agent knew that Sylvia Mendenhall needed only a boarding pass to board the Eastern flight. (A. 11)

(2) He was not aware of the airline routing to Pittsburgh. (A. 17)

(3) American Airlines did not fly from Detroit to Pittsburgh on February 10, 1976.[14]

Hence, the fact that Sylvia Mendenhall was ticketed to Pittsburgh on an Eastern flight afforded the agent no basis for concluding that anything suspicious was afoot.

Lack of Baggage. Sylvia Mendenhall's failure to

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[13] The search involved in *Rogers* occurred at Detroit Metropolitan Airport on February 2, 1976, only eight days prior to the search involved in the instant case.

[14] The proper police practice in this case would have been to continue the investigation rather than to detain a citizen. Neither agent sought to determine the flight schedule to see if the lack of baggage and transfer of airlines factors were of any true significance. One of the two agents could have left the surveillance to check these facts. Indeed both agents should have permitted her to board the Eastern flight, continued to check for incriminating facts, and wired these facts to DEA agents in Pittsburgh. See e.g., *United States v. Oates*, 560 F.2d 45 (2nd Cir. 1977); *United States v. Lewis*, 556 F.2d 717 (6th Cir. 1977); *United States v. Canales*, 572 F.2d 1182 (6th Cir. 1978).

claim baggage during her airline transfer to Detroit also has no significance in determining the reasonableness of the stop. Although the agent contended that this "profile factor" was significant at first, the agent made no claim that it was of continuing significance once he discovered Sylvia Mendenhall was flying through to Pittsburgh.

In the airline transfer context, the then applicable airline tariff agreement provided that baggage checked at the origin point through to the final destination would be transported by the original airline and then transferred by that carrier to the subsequent carrier.[15] In the present case Sylvia Mendenhall's baggage would have been checked from Los Angeles to Pittsburgh by the original airline, American Airlines. Upon arrival of the flight in Detroit, American was obligated by law[16] to transfer this baggage to Eastern Airlines, the carrier flying from Detroit to Pittsburgh. Sylvia Mendenhall, therefore, had no opportunity to obtain her baggage in Detroit, even had she desired to do so.

The evaporation of the baggage factor should have been apparent to the agent once he became aware that Sylvia Mendenhall was continuing on to Pittsburgh and needed only a boarding pass for access to the Eastern flight to Pittsburgh.[17] Common sense alone,

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[15] C.A.B. No. 142, Local and Passenger Rules Tariff No. PR-6, Rule 350, at 157, 69th Revised (effective 2/10/76 — 2/24/76).

[16] Tariff rules which are required to be filed with the Civil Aeronautics Board, pursuant to 49 U.S.C. §1373(a), have the force of law. *City Messenger Service of Hollywood, Inc. v. Capitol Records Distributing Corp.*, 446 F.2d 6 (6th Cir. 1971).

[17] Although the agent thought that the lack of baggage was significant at one point of his observation of Sylvia Mendenhall, he appears to have recognized that this factor evaporated prior to the stop in this case. (A. 16)

apart from the applicable regulations, should have indicated to this experienced agent that under the circumstances Sylvia Mendenhall's baggage would be checked through to her final destination by the airlines.

Thus, the agents had only the following factors to justify the stop, arrest and search of Sylvia Mendenhall: (1) she was on a flight from Los Angeles to Detroit; (2) she was the last passenger to get off the airplane; and (3) upon deplaning, she appeared nervous to Agent Anderson and looked around the area where the agents were standing. These remaining factors are insufficient to provide justification to stop a citizen.

Flight from Los Angeles to Detroit. It seems that all urban centers are included as a profile factor depending on the search at hand. Since most citizens fly to and from urban centers, this factor has only minimal significance:

> Similarly, travel from Los Angeles cannot be regarded as in any way suspicious. Los Angeles may indeed be a major narcotics distribution center, but the probability that any given airplane passenger from that city is a drug courier is infinitesimally small. Such a flimsy factor should not be allowed to justify—or help justify—the stopping of travellers from the nation's third largest city. *See United States v. McCaleb, supra* at 720; *United States v. Scott*, 545 F.2d 38, 40 n.2 (8th Cir. 1976), *cert. denied*, 429 U.S. 1066, 97 S.Ct. 796, 50 L.Ed.2d 784 (1977). Moreover, our experience with DEA agent testimony in other cases makes us wonder whether there exists any city in the country which a DEA agent will not characterize as either a major narcotics distribution center or a city through which drug couriers pass on their way to a major narcotics distribution center.

United States v. Andrews, 600 F.2d 563, 566-67 (6th Cir. 1979).

Last Off the Airplane. Agent Anderson testified that it was significant to him that Sylvia Mendenhall was the last to deplane because "[t]hey can see who is left behind or who may be watching them." (A. 9) However, it is as likely that drug couriers would want to be crowded into the middle of the line in order to avoid attracting attention.

The agent did acknowledge that on every flight from Los Angeles someone has to be the last off the plane. (A. 15) More significant, however, is that this alleged courier characteristic has apparently not been present in any other "profile" case. See *United States v. Westerbann-Martinez*, 435 F. Supp. 690, 698 (E.D. N.Y. 1977).

Nervousness. The extent to which it is common for travellers to be nervous and to exhibit signs of nervousness because of innate personality traits, fear of airplane travel, or any number of other reasons renders this factor very insignificant. As the Sixth Circuit has noted:

> We agree with the district court that nervousness by two of Andrews' companions should be entitled to no weight. Nervousness is entirely consistent with innocent behavior, especially at an airport where a traveller may be anticipating a long-awaited rendevous with friends or family.[4] See *United States v. McCaleb*, 552 F.2d 717, 720 (6th Cir. 1977); *United States v. McClain*, 452 F. Supp. 195, 200 n.3 (E.D. Mich. 1977).

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[4] In other contexts, the government has argud the nervousness factor in various ways. For example, in *United States v. Escamilla*, 560 F.2d

> 1229, 1233 (5th Cir. 1977) the court noted that at times the government argues that it was suspicious for the occupants of a vehicle in the border zone to react nervously when a patrol car passed, while at other times the government argues that it was suspicious if the occupants just looked at the road and did not acknowledge the patrol car. Similarly, in *United States v. Himmelwright*, 551 F.2d 991, 992 (5th Cir. 1977), the government argued that it was suspicious that a woman was excessively calm while going through customs.
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> *United States v. Andrews, supra*, at 566.[18]

The agents possessed no facts which even approach justification for the stop of a citizen. There are no cases upholding investigatory stops on facts like these. One Fifth Circuit case, *United States v. Ballard*, 573 F.2d 913 (5th Cir. 1978) involved facts similar to those at hand:

> Because as discussed above, we give little weight to the amount of luggage carried by Ballard, and the suspicion that he arrived from Los Angeles, Ballard's supposed nervousness and his walking pace are the only substantial factors offered to justify the search, and we would be most reluctant to hold that the police can stop anyone exhibiting only those two characteristics. We conclude that Offi-

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[18] In *United States v. Westerbann-Martinez*, 435 F. Supp. 690 (E.D. N.Y. 1977), the court noted that the "nervousness" observed in that case was not the kind of specific and articulable fact and inference necessary to support an investigative stop:

> This court is not prepared to user in the day in this country, when, without stronger objective incriminatory evidence, any person may be subject to a police stop after arriving by plane in an airport merely because an agent subjectively concludes that repeated looking around is a manifestation of nervousness.
>
> *Id.* at 699.

> cer Donald did not have reasonable suspicion to stop Ballard and that, therefore, the stop was in violation of the fourth amendment.
> 573 F.2d at 916.

These three flimsy factors do not constitute the kind of reasonable suspicion envisioned by *Terry v. Ohio*, 392 U.S. 1 (1968) and its progeny. *Terry* allows police to stop and investigate a citizen only if there are specific and articulable facts which would create a reasonable suspicion that criminal activity is afoot:

> Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.
> *Id.* at 22.

Similar to the circumstances of *Brown v. Texas*, ___ U.S. ___, 99 S.Ct. 2637 (1979), the flaw in the government's case is that none of the circumstances preceding the stop of Sylvia Mendenhall established a reasonable suspicion that she was involved in criminal conduct. Someone must be last off each and every flight. Most persons tend to fly to and from major cities, and because of infinite reasons, including the flight itself, many appear nervous.

B. The Seizure without Reasonable Suspicion Was Complete and Defendant's Liberty Was Restrained When She Was Required to Give Federal Agents Her Driver's License Which Was Held by the Agents While Defendant Was Required to Continue to Answer Questions and Thereafter Required to Give Federal Agents Her Airplane Ticket.

The seizure in this case was complete when the agent approached Sylvia Mendenhall and invoked his au-

thority as a federal officer to require that she produce identification from her purse. Upon receiving her driver's license, he retained it, while insisting that she produce her airline ticket for his inspection as well. (A. 12)[19] This conduct hardly constitutes a simple police-citizen encounter where the agent has conducted himself "in a manner consistent with what would be viewed as a non-offensive contact if it occurred between two ordinary citizens."[20] It is likely that most people would be quite offended if a stranger approached, required identification and then retained that identification while demanding proof and an explanation of one's itinerary.

In *Terry v. Ohio, supra*, the Court found it unnecessary to determine if the seizure occurred prior to the time the officer grabbed Terry. (392 U.S. at 19, n.16) Prior to that action the officer had approached Terry and his companions on the street, identified himself as a police officer and asked for their names. *Id.* at 7. A simple request for a name is an action of considerably different quality than insisting that a citizen produce identification, hand it over to the officer, and produce her airline ticket while the officer retains possession of the driver's license. "Whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person." *Id.* at 16; *United States v. Brignoni-Ponce*, 422 U.S. 873, 877 (1975). Sylvia

[19] The Second Circuit Court of Appeals also found that an investigative stop had been made when agents approached a citizen outside an airport, identified themselves, and requested identification from the citizen with the citizen handing over his driver's license and airplane ticket at the same time. *United States v. Vasquez-Santiago*, 602 F.2d 1069 (2nd Cir. 1979).

[20] 3 W. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment*, 9.2 at 53 (1978).

Mendenhall could not have reasonably believed that she was free to leave at this point.

In *Brown v. Texas*, ___ U.S. ___, 99 S.Ct. 2637 (1979), the Court analyzed the constitutional significance of stopping and demanding identification from an individual:

> When the officers detained appellant for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment.
> *Id.* at 2640.

Brown makes it clear that when the agents stopped Sylvia Mendenhall and required and retained her identification a seizure subject to the requirements of the fourth amendment had occurred.

In recent years, the Court has rejected claims that particular societal interest justify intrusion into the personal liberty, security and privacy guaranteed by the fourth amendment. For example, the Court has rejected efforts to dispense with the safeguards of the fourth amendment based on the "vital public interest in the prompt investigation of the extremely serious crime of murder," *Mincey v. Arizona*, 437 U.S. 385 (1978); the public interest in fire investigation, *Michigan v. Tyler*, 436 U.S. 499 (1978); and the public interest in occupational safety, *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978).

Unfettered discretion to stop citizens at will cannot be justified. The fact that observed behavior is innocuous cannot serve as the justification for an intrusion. The courts of appeals have looked at these factors of the "drug courier profile"—Los Angeles, nervousness and glancing around—and have rejected stops based only on such innocuous characteristics.

C. The Drug Courier Profile Does Not Overcome Defendant's Fourth Amendment Protections.

The government relies upon the DEA agents' "drug courier profile" in contending that the facts known about Sylvia Mendenhall at the time she was stopped, rose to a level of "reasonable suspicion." This "profile" is a rather loosely formulated list of unwritten characteristics used by agents to indicated "suspicious persons" who are travelling to or from cities believed by the DEA to be drug "source" cities.[21] Each court of appeals that has analyzed this courier prifile agrees that the courier profile in an unsufficient basis to justify an investigative stop. *United States v. Ballard,* 573 F.2d 913 (5th cir. 1978); *United States v. McCaleb,* 522 F.2d 717 (6th Cir. 1977); *United States v. Rico,* 594 F.2d 320 (2nd Cir. 1979). *See also United States v. Cortez,* 595 F.2d 505 (9th cir. 1979); *United States v. Klein,* 592 F.2d 909 (5th Cir. 1979). As one district court has noted, the profile has "a chameleon-like quality: it seems to change itself to fit the

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[21] Among the "source" cities which have been identified are: New York, San Diego, Miami, Los Angeles, Dallas-Ft. Worth, San Juan, Chicago and Detroit. *See e.g. United States v. Vasquez-Santiago,* 602 F.2d 1069 (2nd Cir. 1979); *United States v. Price,* 599 F.2d 494 (2nd Cir. 1979); *United States v. Elmore,* 595 F.2d 1036 (5th Cir. 1979); *United States v. Rico,* 594 F.2d 320 (2nd Cir. 1979); *United States v. Craemer,* 555 F.2d 594 (6th Cir. 1977); *United States v. Allen,* 421 F. Supp. 1372 (E.D. Mich. 1976); *United States v. Van Lewis,* 409 F. Supp. 535 (E.D. Mich. 1976). At the evidentiary hearing in *United States v. Camacho,* argued en banc with the instant case, the agent identified Phoenix and Tucson as also being among the "source" cities. (C.A. App. at 39)

It is questionable as to "whether there exists any city in the country which a DEA agent will not characterize as either a major narcotics distrubution center or a city through which drug couriers pass on their way to a major narcotics distribution center." *United States v. Andrews,* 600 F.2d 563 (6th Cir. 1979).

facts of each case."[22] Indeed, from an examination of the reported cases arising out of Detroit,[23] and other cities,[24] it seems clear that it is a rare airline passenger who would not

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[22] *United States v. Westerbann-Martinez*, 435 F. Supp. 690, 698 (S.D. N.Y. 1977).

[23] The characteristics of the profile used at Detroit Metropolitan Airport, as testified to by agents in the reported cases, have included, *inter alia*, taking direct flights to and from specified cities; staying in destination cities for a very short period of time; use of small denomination currency for ticket purchases; absence of luggage; insufficient luggage; use of empty or nearly empty suitcases; nervousness; traveling alone and being met by no one at the airport; directly leaving the airport in a hurried and nervous manner; furnishing a false number to an airline when a telephone contact is requested; meeting with known drug dealers; attemtping to conceal the fact that someone is traveling with them or that someone may be waiting for them; making a telephone call after deplaning; and, exiting at a level where there is no public transportation. *See e.g. United States v. Smith*, 574 F.2d 882 (6th Cir. 1978); *United States v. Lewis*, 556 F.2d 385 (6th Cir. 1977); *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977); *United States v. Chambliss*, 425 F. Supp. 1330 (E.D. Mich. 1977) *United States v. Allen*, 421 F. Supp. 1372 (E.D. Mich. 1976); *United States v. Floyd*, 418 F. Supp. 724 (E.D. Mich. 1976).

[24] In addition to many of the characteristics listed *supra*, agents involved in searches at other airports have testified that their courier profiles included, *inter alia*, passengers of Hispanic origin (especially Mexicans); excessively frequent travel to "source" or "distribution" cities; the use of public transportation in departing the airport, particularly taxicabs; an unusual intinerary; purchasing a one-way ticket; carrying lugguage without the identification tags required by federal regualtions; travel by a known narcotics trafficker; dressing differently from the usual pattern of dress on the flight; use of cash of small or large denominations to purchase tickets; leaving the airport immediately; and, whispered conversation with a friend. *See e.g. United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979); *United States v. Rico*, 594 F.2d 320 (2nd Cir. 1979); *United States v. Ballard*, 573 F.2d 913 (5th Cir. 1978); *United States v. Craemer*, 555 F.2d 594 (6th Cir. 1976); *United States v. Westerbann-Martinez*, 435 F. Supp. 690 (E.D. N.Y. 1977); ***Bowers v. State***, 57355 (Ga. App. 6/28/79).

satisfy at least some of the "profile" characteristics.[25]

The courts of appeals have realized that there is no airport traveller exception to the fourth amendment and that recognition of the power sought by the government here would sanction not only stops at airports but anywhere in the country. The number of "profiles" could be increased to allow federal agents to search anyone at any time. Recently, the Ninth Circuit has rejected random searches by use of both an "alien courier profile," *United States v. Cortez*, 595 F.2d 505 (9th Cir. 1979) and a "stolen vehicle profile," *United States v. Carrizoza-Gaxiola*, 523 F.2d 239 (9th Cir. 1975). Likewise, the Fifth Circuit has held that resemblance to a "smuggling profile" does not determine the constitutional validity of a search since that depends on the facts of each case. *United States v. Klein*, 592 F.2d

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[25] The near impossibility of any passenger failing to satisfy at least some of the "profile" characteristics is due, in part, to the agents' ability to find satisfaction of a "profile factor" regardless of what the factual situation is. Thus, if a passenger takes a direct flight he is said to have satisfied a "factor" in the "profile." If, however, as in the instant case, a passenger does not take a direct flight, he is also said to have satisfied a "factor."

This "heads I win, tails you lose" situation is characteristic of the "drug courier profile." Regardless of what city the passenger comes from, it is claimed to be a major narcotics distribution center. If the passenger pays for his ticket with small denomination currency, he has satisfied a "factor" in the "profile." If he uses currency of large denomination, he has also satisfied a "factor." If he has no luggage, little luggage, or too much luggage, a "factor" has been satisfied. If the passenger makes a telephone call, he has satisfied a "factor." But, if he leaves the airport immediately, he has also satisfied a "factor." If he leaves the airport at a level where there is no public transportation, he has satisfied a "factor." If he leaves the airport at a level where there is public transportation, and uses it, he has also satisfied a "factor." See *supra*, p. 42, nn/22-24.

909 (5th Cir. 1979).[26]

For purposes of this case, however, the record does not even fit the the "drug courier profile." Of all the factors that have been listed in the reported cases, the government has been able to articulate only three in this case. No court of appeals drug courier profile case has upheld a stop, arrest and search of a citizen on facts like these.

Similar to the broad applicability of the Mexican ancestry factor relied on by the agents in *United States v. Brignoni-Ponce, supra*, the satisfaction of the literally endless number of unwritten airport profile factors will occur in a very large number of airline passengers. The government's quest here seems to be to eliminate the case-by-case approach and to obtain permission to search at will by judicial fiat. This our constitution does not allow:

> "[To] argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purpose of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harrassment and ignominy incident to involuntary detention. Nothing is more clear than the Fourth

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[26] Cases involving the use of a "skyjacker's profile" provide no support for the government's position in this case.

The profile has not been officially used since January, 1973 at which time the Federal Aviation Administration ordered that all carry-on baggage must be searched and all passengers must be screen by the magnetometer. *See United States v. Davis*, 482 F.2d 893, 900 (9th Cir. 1973).

Further, no reported "skyjacker profile" case has permitted a search of the person based solely on the profile. *See e.g. United States v. Ruiz-Estrella*, 481 F.2d 723, 726, 729 (5th Cir. 1973). Rather, the courts have consistently required a positive magnetometer reading and other information, such as an informant's tip, in addition to the profile.

> Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions'"
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> *Dunaway v. New York*, 99 S.Ct. at 2257 citing *Davis v. Mississippi*, 394 U.S. 721, 726-27 (1969). *See also Ybarra v. Illinois*,___ U.S. ___, 48 U.S.L.W. 4023 (U.S. Nov. 28, 1979).

Although the courts of appeals have refused to grant carte blanche permission to stop and search citizens with the mere incantation of "airport drug courier profile," the courts have considered every fact known to a policeman in determining the legality of a search. The officer's experience factor has been set out, argued, briefed, reiterated at length and considered in case after case.

In the Sixth Circuit Court of Appeals dozens of searches have been upheld or struck down thus far.[27] *United States v. Lewis*, 556 F.2d 385 (6th Cir. 1977) has provided guidelines for probable cause arrests, while *United States v. Canales*, 572 F.2d 1182 (6th Cir. 1978) has defined articulable reasonable suspicion in upholding an airport search:

> Obviously, reasonable agents would recognize that Canales' travelling was potentially innocent and capable of explanation. However, their reasonable suspicions independently founded provided a sufficient nexus between the defendant's present

[27] Reported decisions upholding searches include: *United States v. Lewis*, 556 F.2d 385 (6th Cir. 1977); *United States v. Canales*, 572 F.2d 1182 (6th Cir. 1978); *United States v. Pope*, 561 F.2d 663 (6th Cir. 1977); *United States v. Smith*, 574 F.2d 882 (6th Cir. 1978); *United States v. Gill*, 555 F.2d 597 (6th Cir. 1977); *United States v. Andrews*, 600 F.2d 563 (6th Cir. 1979). Reported decisions refusing to uphold searches include: *United States v. Craemer*, 555 F.2d 594 (6th Cir. 1977); *United States v. Hunter*, 550 F.2d 1066 (6th Cir. 1977); *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977).

> behavior and criminal activity to justify the stop as the government's attempt to determine that his activity was, in reality, innocent activity.
> *Id.* at 1187.

United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977) does not hold or imply that probable cause is necessary for an investigative stop.[28] Rather, *McCaleb* recognized that profile factors must be evaluated on a case-by-case basis along with other facts in determining constitutional parameters:

> While a set of facts may arise in which the existence of certain profile characteristics constitute reasonable suspicion, the circumstances of this case do not provide "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant[ed]" the intrusion of an investigatory stop. *Terry v. Ohio, supra,* 392 U.S. at 21; *United States v. Cupps,* 503 F.2d 277, 281 (6th Cir. 1974).

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[28] In *McCaleb*, the govenment agents' stop of the defendant were based on the following:

(1) Three persons arrived at Detroit Metropolitan Airport on a non-stop flight from Los Angeles.
(2) One person was carrying a shoulder bag; the others carried no lugguage.
(3) Two of the persons were seen boarding a plane for Los Angeles the previous evening wearing the same clothes.
(4) Two of the persons appeared nervous; one did not.
(5) McCaleb claimed one bag.

Id. at 720.[29]

United States v. Oates, 560 F.2d 45 (2nd Circ. 1977) is consistent with Sixth Circuit airport search authority, although it is a primary case cited by the government in support of government contentions. Oates' face and name were familiar to the detectives as known narcotics dealer. Daniels (Oates' companion) exhibited telltale characteristics of drug addition during the long airplane flight from Detroit to New York. These factors, *inter alia*, were added to the bulges in Daniels' clothing, which the Second Circuit discussed, Saying, "here the bulges in Daniels' clothing were highly suspicious, and the officers were justified in at least feeling them to ascertain whether they wer in fact weapons." In the Sixth Circuit, *United States v. Lewis, supra*, and *United States v. Prince*, 548 F.2d 164 (6th Cir. 1977), would have been controlling, and the search would have been upheld.

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[29] *United States v. McCaleb, supra*, was joined at the district court with *United States v. Van Lewis*, 409 F. Supp. 535, (E.D. Mich. 1976) *aff'd* 556 F.2d 385 (6th Cir. 1977) for a hearing to scrutinize the statistical claims of agents working at Detroit Metropolitan Airport. The testimony given at that hearing involved the period from January 31, 1975 through February 8, 1976. Supplemental Appendix for Appellant at 7, *United States v. Mendenhall*, 596 F.2d 706 (6th Cir. 1979). Sylvia Mendenhall was arrested on February 10, 1976.

Because of the closeness of the dates involved, part of the *McCaleb* testimony was included in the Supplemental Appendix filed in the Sixth Circuit Court of Appeals en banc hearing in this case. It is worth noting that:

1. No records were kept as to how many consent searches took place where no contraband was found. Supplemental Appendix, *supra*, at 1.
2. It is impossible to determine how many successful searches resulted from use of the profile alone—an unspecified number of searches involved both the profile and either an informant's tip or some other unspecified type of independent corroboration. Supplemental Appendix, *supra*, at 5, 6.

D. The Degree of Restraint Imposed on Defendant Exceeded That Permissible in an Investigatory Stop.

Even assuming, arguendo, that an investigatory stop of the defendant was permissible, the intrusion here went far beyond the parameters set by *Terry, supra,* and *Brignoni-Ponce, supra.* In *Terry*, the Court stated that the stop and inquiry must be "reasonably related in scope to the justification for their initiation." 392 U.S. at 29. *Accord, United States v. Brignoni-Ponce,* 422 U.S. at 878. Thus, a detention based on anything less than probable cause must be commensurately less intrusive in scope. "The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries." *Sibron v. New York*, 392 U.S. 40, 64 (1968). *Brignoni-Ponce* stated that "any further detention or search must be based on consent or probable cause." 422 U.S. at 878.

Even before the alleged consent to search was given, defendant was subjected to significant encroachments and restraints. Sylvia Mendenhall was led to a private room by two federal agents and her liberty was absolutely restrained. This was not the type of brief, modest intrusion envisioned by *Terry, supra.*[30] For this reason, the treatment of Sylvia Mendenhall by the agents constitutes an illegal seizure of her even if a less intrusive investigation would have been permissible.

E. The Fourth Amendment Does Not Allow Intrusions upon Free Passage and Personal Security through Unfettered Police Discretion.

Investigative detentions of uncounted number of

[30] It was nowhere contended that a search for weapons under *Terry* was involved.

citizens who evidence the unlimited number of unwritten changing characteristics of the airport drug courier profile necessarily entail substantial intrusions upon significant fourth amendment interests: the "right to free passage without interruption," *United States v. Martinez-Fuerte*, 428 U.S. 543, 557-58 (1976); *Carrol v. United States*, 267 U.S. 132, 153-54 (1925); "the right to personal security," *United States v. Brignoni-Ponce*, 422 U.S. at 878; and, "the right to privacy," *Terry v. Ohio*, 392 U.S. at 9..

The mere stacking of innocuous "profile" characteristics is insufficent to overcome constitutional standards. The courts of appeals have required a real tie-in with criminal activity. Simple good faith on the part of the arresting officer is not enough on which to base the stop of a citizen who is the last person off a flight from Los Angeles and who appears to be nervous while looking about the deplaning area.

This Court has made it clear in *Terry* that "[i]f subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects, only in the discretion of the police." 392 U.S. at 22.

III.
THE CONSENT TO SEARCH GIVEN BY DEFENDANT WAS INVALID WHERE THE CONSENT WAS NOT VOLUNTARY AND WAS THE PRODUCT OF AN ILLEGAL DETENTION.

The strip search of Sylvia Mendenhall's person was not supported by probable cause. The search can only

be upheld if the "consent" to search was freely and voluntarily given and was not the product of an illegal detention.

It is the position of the defendant that the consent followed a stop without reasonable suspicion and an arrest without probable cause. A consent resulting from the expolitation of an illegal detention is invalid under *Brown v. Illinois*, 422 U.S. 590 (1975), regardless of the voluntariness of the consent. Further, the circumstances in this record also fail to demonstrate a consent voluntarily given.

A. The Alleged Consent Was Not Freely and Voluntarily Given.

When the government seeks to rely upon consent to justify the lawfulness of a search, it has the burden of proving that the consent was, in fact, freely and voluntarily given. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). The fourth amendment requires that the government demonstrate that the consent was not the result of duress or coercion, express or implied. *Schneckloth v. Bustamonte*, 412 U.S. 212, 248 (1973).

In *Bumper*, the defendant's grandmother had allowed a search of her home after officers claimed they had a search warrant. Despite the woman's own testimony that the consent was "all my own free will" the Court refused to uphold the "consent" search: "[W]here there is coercion there cannot be consent." 391 U.S. at 550.

The Court in *Schneckloth* held that the voluntariness of a consent must be determined from the totality of all the circumstances. The Court upheld the search of a motor vehicle where the operator gave verbal consent, obtained the keys and opened the trunk for the officers, and where, according to uncontradicted testimony, "it was all very congenial at the time." The Court stated:

> In this case, there is no evidence of any inherently coercive tactics—either from the nature of the police questioning or the environment in which it took place. Indeed, since consent searches will normally occur on a person's own familiar territory, the specter of incommunicado police interrogation in some remote station house is simply inapposite. 412 U.S. at 247.

The setting in which Sylvia Mendenhall allegedly gave consent to a search of her person is in sharp contrast to that in *Schneckloth*. The airport program, by design and implementation, seeks to obtain consent for searches of the person and luggage which would otherwise be impermissible for lack of probable cause.[31] The agents bring their suspects into an unfamiliar and coercive setting to obtain the consent. The suspect can only believe that he or she will be forcibly searched, or held indefinitely, unless the consent to search is given.

Sylvia Mendenhall was stopped by two men as she walked down a concourse to board a plane to Pittsburgh. The men identified themselves as federal agents, questioned her, and required the production of her identification and airline ticket. (A. 11)

The two federal agents subsequently ushered Sylvia Mendenhall into the private, locked office of the Drug Enforcement Administration. (A. 12)[32] They never informed her that she would be free to catch her plane nor even inquired when her flight was leaving. According to the testimony of Agent Anderson: "I asked her for her consent to search her person as well as her

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[31] *See* Government's Petition for Rehearing With Suggestion for Rehearing En Banc at 7, *United States v. Mendenhall*, 596 F.2d 706 (6th Cir. 1979).

[32] As Sylvia Mendenhall was not present at the evidentiary hearing the only account of what occurred was that of the agents.

handbag. I stated to her that she had the right to decline the search if she so desired. Her response was 'Go ahead.'" (A. 12) Sylvia Mendenhall had no reason to believe that if she refused to consent, she would be released or would not be forcibly searched.

After a search of Sylvia Mendenhall's purse failed to uncover anything illegal the agents awaited the arrival of a female police officer. (A. 12) When Officer Beverly Mercier of the Metro Airport Police Department arrived, she gave the agents her gun and accompanied Sylvia Mendenhall into a separate room within the DEA office. (A. 24)

According to Officer Mercier, Sylvia Mendenhall was asked if the consented to the search and replied that she did. Officer Mercier then said, "It's a strip search. That means everything comes off." (A. 24) This was the first time that Sylvia Mendenhall was informed that there was to be a full strip search.

It was at this point that Sylvia Mendenhall told the officer that she had a plane to catch. (A. 24) If any consent can be deemed to have been given previously, this constituted a revocation. She was never told that she was free to catch her plane. Rather, she was told that "if you don't have anything on you, you don't have any problem." (A. 24) In fact, had she attempted to leave the DEA office she would have been stopped. (A. 21)

Sylvia Mendenhall kept repeating that she had a plane to catch as she began to undress at the direction of Officer Mercier. (A. 24, 27)

The Court has recognized that the "possibly vulnerable subjective state of the person who consents" must be taken into account in examining all the surrounding circumstances to determine if, in fact, the consent to search was coerced. *Schneckloth v. Bustamonte, supra*

at 229. The defendant here was 22 years old. She had an eleventh grade education. (A. 13) Of particular importance here, however, was Sylvia Mendenhall's state of mind at the time of granting "consent" to the search. Agent Anderson testified that, immediately prior to going to the DEA office, he informed her that he was a federal narcotics agent, and "[s]he became quite shaken, extremely nervous. She had a hard time speaking." (A. 11-12) It was at this point that Sylvia Mendenhall was taken to the DEA office and gave "consent" to a search. Additionally, Sylvia Mendenhall had not been informed that it would be a woman, rather than Agent Anderson, who would actually perform the search of her person. It is incredible that Sylvia Mendenhall would freely and voluntarily consent to a full strip search that she could only believe would be performed by the male agent.

In *Schneckloth*, the Court admonished that:

> [T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion were applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed. 412 U.S. at 228.

Sylvia Mendenhall was subjected to serious physical restraints and psychological pressure. She was stopped by federal agents in a public airport and taken to their private and locked office where she faced the prospect of indefinite detention. She protested that she had a plane to catch even as the search continued. Given the surrounding circumstances, as well as her own subjective state, her consent, if given, was not the product of a free will.

B. The Alleged Consent Was the Product of an Illegal Detention.

The "consent" cannot support the search here for a related, but independent, reason. The "consent" followed a stop without reasonable suspicion and an arrest without probable cause. It was given during an illegal detention. There was no intervening factor of significance to dissipate the taint of the illegal detention. Rather, the "consent" was the direct product of the illegal stop and arrest.

In *Wong Sun v. United States*, 371 U.S. 471 (1963) a statement by defendant James Toy followed an illegal arrest. The Court held the statement inadmissible where it did not result from "an intervening independent act of free will," and was not "sufficiently an act of free will to purge the primary taint of the unlawful invasion." *Id.* at 486.

A confession was obtained following an arrest without probable cause in *Brown v. Illinois*, 422 U.S. 590 (1975). Finding the relevant inquiry to be "whether Brown's statements were obtained by exploitation of the illegality of his arrest," *id.* at 600, the Court held that there was "no intervening event of significance whatsoever," *id.* at 605, despite the giving of *Miranda* warnings and a lapse of two hours from the illegal arrest before the incriminating statement was made. The same result was recently reached under similar facts in *Dunway v. New York*, ___ U.S. ___, 99 S.Ct. 2248 (1979).

Brown and *Dunaway* identified several factors in determining whether a confession obtained following an illegal arrest is admissible: (1) the temporal proximity of the arrest and confession; (2) the presence of intervening circumstances; and, (3) the purpose and flagrancy of the official misconduct. *Brown, supra* at

603-04; *Dunaway, supra* at 2259. A consideration of the facts of this case in light of these factors requires the conclusion that the "consent" cannot support the search.

The temporal proximity between the illegality and the discovery of the evidence is material in determining the admissibility of the evidence. *United States v. Ceccolini*, 435 U.S. 268 (1978). Here, the "consent" and subsequent search occurrred within minutes of a stop not supported by reasonable suspicion, within minutes of an arrest not supported by probable cause, and while the illegal detention continued.

The only intervening circumstance claimed is that Sylvia Mendenhall, while in the locked DEA office, was informed of her right to refuse consent. In *Brown* and *Dunaway* the Court held that the detailed *Miranda* warnings were insufficient, without more, to dissipate the taint of an illegal arrest where a confession was sought to be introduced. Here, Sylvia Mendenhall was allegedly informed, on one occasion, that she did not have to consent to a search. She was never told, of course, that she was free to leave if she did not wish to consent. The reasoning of *Brown* and *Dunaway* is equally applicable in the present case. The brief warning given here, without more, was insufficient to dissipate the taint of the illegal detention.

The action of the agents here was also like that in *Brown* and *Dunaway* where the arrests without probable cause had a "quality of purposefulness" in that it was an "expedition for evidence" admittedly undertaken "in the hope that something might turn up." *Brown, supra* at 605; *Dunaway, supra* at 2259. Additionally, actions by agents at Detroit Metropolitan Airport, similar to those in the instant case, had been condemned by the United States District Court for the Eastern

District of Michigan prior to the arrest here.[33]

When evidence is obtained following illegal activities by the police the burden of proving admissibility rests on the prosecution. *Brown, supra* at 604. Further, " . . . when there is a close causal connection between illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts." *Dunaway, supra* at 2259.

The consent to a strip search given by Sylvia Mendenhall here, like the incriminating statements made by defendants in *Brown* and *Dunaway*, was obtained by the exploitation of the illegal arrest.

C. The Court of Appeals Correctly Held That the Alleged Consent Was Invalid.

In its opinion in this case and *United States v. Camacho*, 596 F.2d 706 (6th Cir. 1979), the court of appeals, en banc, found "that in neither case was there valid consent to search within the meaning of *United*

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[33] *See e.g., United States v. Bryant*, 406 F. Supp. 635 (E.D. Mich. 1975); *United States v. Pruss*, Cr. No. 5-81244 (E.D. Mich. 1/14/76); *United States v. Hunter*, Cr. No. 5-81318 (E.D. Mich. 2/4/76).

In *Bryant, supra*, DEA agents had escorted the defendant to their office at the airport. The district court found that she was under "practical arrest," if not under formal arrest, that the agents did not possess probable cause, and that a "consent" to search her luggage was coerced rather than voluntary. *Id.* at 640.

In *Pruss, supra*, the district court found that the defendant, who had been ushered into a private office by agents at the airport, was arrested without probable cause and that his consent was involuntary where the detention had "all the earmarks of being designed to cause surprise, fright and confusion." *Id.* at 13.

States v. McCaleb, 552 F.2d 717 (6th Cir. 1977)." 596 F.2d at 707.

In *McCaleb*, the Sixth Circuit refused to uphold a search where the "consent" was obtained after the defendants were stopped without reasonable suspicion and taken into an office within the airport by agents. The *McCaleb* opinion cited *Wong Sun v. United States, supra*, and *Brown v. Illinois, supra*, in requiring the government to meet the heavy burden of establishing that the "consent" of an illegally detained person attenuated the taint of the illegality. Citing *Schneckloth* v. Bustamonte, *supra, McCaleb* held that the government had failed to establish that the "consent" was "freely and voluntarily" given. *United States v. McCaleb*, 552 F.2d at 721.

The Sixth Circuit has correctly applied the established law of this Court to the airport search context. Whether the "consent" is considered under the "totality of the circumstances" test of *Schneckloth* or under the "fruit of the poisonous tree" doctrine of *Wong Sun*, *Brown*, and *Dunaway*, the search here must fail. A person in the position of Sylvia Mendenhall could not reasonably believe that she had any choice but to submit to a strip search. A "consent" by such a person, without a showing that it was truly a free and voluntary decision and absent any intervening circumstances of any significance, cannot justify a search conducted without probable cause.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

FEDERAL DEFENDER OFFICE

F. RANDALL KARFONTA

KENNETH R. SASSE

STEPHEN P. GLEIT

Attorneys for Respondent
600 Woodward Avenue
Detroit, Michigan 48226
Telephone: (313) 961-4150